A

PP v. NAZARIMAN BUJANG & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
ISMAIL BRAHIM JC
[CRIMINAL APPEAL NO: KCH-42 AC-1-1-2016]
2 AUGUST 2016

B

CRIMINAL LAW: *Penal Code – Section 395 – Committing gang robbery – Identification parade – Conduct of – Whether identification of suspects done under difficult conditions – Small number of participants arranged for parade – Whether accused persons prejudiced – Whether requirements in PP v. Jamal Sahmad complied with – Circumstantial evidence – Components of stolen motorcycle found near accused persons' premises – Whether sufficient to hold accused persons in possession of stolen components – Whether there was lack of crucial information and evidence to link accused to discovery – Evidence Act 1950, s. 114(a)*

C

EVIDENCE: *Identification of parade – Conduct of – Whether identification of suspects done under difficult conditions – Small number of participants arranged for parade – Whether accused persons prejudiced – Whether requirements in PP v. Jamal Sahmad complied with*

D

EVIDENCE: *Circumstantial evidence – Gang robbery – Components of stolen motorcycle found near accused persons' premises – Whether sufficient to hold accused persons in possession of stolen components – Whether there was lack of crucial information and evidence to link accused to discovery – Evidence Act 1950, s. 114(a)*

E

The Public Prosecutor ('the appellant') appealed against the decision of the Sessions Court Judge ('the SCJ'), who had discharged and acquitted the respondents without calling for them to enter their defence in respect of a charge under s. 395 of the Penal Code for committing gang robbery. On 16 March 2015, the victim ('PW5') was carrying out his normal routine when his motorcycle developed some engine trouble. He then stopped by the roadside to check on the engine when another bike stopped by, and two unknown persons ('the respondents') approached him. According to PW5, the second respondent had grabbed him from behind while the first respondent stood in front of him and demanded money from him. A fight ensued between the three until the second respondent managed to ride off with PW5's bike and the first respondent followed suit. Eight days after PW5 lodged a police report, he was asked by the police to attend an identification parade where he identified two suspects who were later identified as the first and second respondents in this case. During trial, the prosecution also adduced evidence through a witness PW4 to implicate the respondents with the charge. PW4 stated that on the night of 16 March 2015, he was shown some dismantled motorcycle components in the second respondent's bedroom. Another piece of evidence that the prosecution had relied on to

F

G

H

I

show the involvement of the respondents to the present case was the discovery of dismantled motorcycle components by a team of police officers near the respondents' house on 20 March 2015. The SCJ, however, came to the conclusion that the identification parade that was arranged by the police was unsatisfactory, thus PW5's evidence on the identification of the respondents was doubtful. The SCJ also held that the evidence of the dismantled parts of the motorcycle stolen from PW5 which were found behind the respondents' house was insufficient to link the respondents to the charge. The gist of the appellant's appeal herein was that if all these evidence were taken into consideration by the SCJ, she would have arrived at a different conclusion. According to the appellant, the issue of identification must not be treated in isolation without considering the circumstantial evidence of this case.

Held (dismissing appeal; affirming decision and order of Sessions Court Judge):

(1) PW5's evidence on the identification of the suspects was done under difficult conditions. PW5 had the two robbers under observation for a short period of seven to eight minutes. They were also wearing helmets at the material time. One would find it hard to recognise a person's face when a person is helmeted. This fact, coupled with the short span of time where PW5 had the opportunity to observe the robbers' faces, would obviously make it difficult for one to be certain of how the person would look like without the helmet. Further, the number of participants that were arranged for the ID parade was limited to ten persons; these included the respondent persons. With a small number of participants, the chances for PW5 to pick the suspects as the perpetrators were higher. Thus, the identification parade that was carried out herein did not meet the requirements explained in the case of *PP v. Jamal Sahmad & Anor* and had prejudiced the respondents. Therefore, the finding by the SCJ not to rely on the identification made from the ID parade was justified. There was no misdirection either on the facts or the law, to warrant this court to intervene in the said findings. (paras 14, 17, 18, 22 & 23)

(2) The SCJ could not be faulted for holding that PW4's evidence was inconclusive, as the evidence given by PW4 was short of proving that the said components he saw in the second respondent's bedroom were the same components that were discovered by PW2's team on 20 March 2015. Without the crucial confirmation by PW4 on this piece of evidence, there was no link to show that the components he saw were the same components that were discovered subsequently, and in turn to connect the evidence to the identification of the respondents by PW5. (para 26)

(3) There was no evidence to support or to link the second respondent to the discovery of the components found in the bushes behind the respondents' house. The discovery was in an open space and there was no evidence that the second respondent had informed the police or led the police to the discovery of the components. Without such evidence, the mere fact that the components were found within the surrounding areas where the respondent's house was located was not sufficient for the court to hold the respondents in possession of the components and within the meaning of s. 114(a) of the Evidence Act 1950. (para 29)

Case(s) referred to:
Jaferi Ipee v. PP [2013] 3 CLJ 381 CA ***(dist)***
Mohd Razaly Rahmad v. PP [2015] 2 CLJ 574 HC ***(refd)***
PP v. Jamal Sahmad & Anor [2006] 8 CLJ 428 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(a)
Penal Code, s. 395

For the appellant - Musli Ab Hamid; DPP
For the respondents - Mohd Osman Ibrahim; M/s Osman Ibrahim & Co Advocs

[Editor's note: Appeal from Sessions' Court; Criminal Case No: KCH-62RS-18-3-2015 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ismail Brahim JC:

Introduction

[1] In this case, the appellant is the Public Prosecutor. The appellant is appealing against the decision of the learned Sessions Court Judge (SCJ), who had discharged and acquitted the respondents without calling for them to enter their defence in respect of a charge under s. 395 of the Penal Code for committing gang robbery. The charge reads as follows:

[2] The Charge

That both of you, on 16th March 2015 at about 2.30 p.m. by the roadside of Jalan Kilang, Bintawa, in the district of Kuching, in the state of Sarawak, had committed gang robbery of one Honda EX5 motorcycle (registration number QAR 4901: chasis number: PMKHA 13209B075707: engine number: HA13E-4075890 from the possession of one Ainur Raziq bin Anuar (IC Number 950314-13-5821) and both of you had thereby committed an offence punishable under section 395 of the Penal Code.

The Brief Facts Of The Case

[3] The victim or the complainant, in this case, is one Ainur Raziq Anuar. He was referred as PW5 in this case. At the material time, he worked as an employee of CKS supermarket. Among his duties were to deliver goods to customers of the supermarket. He delivered the goods to the customers using a motorcycle which belonged to the company. In his evidence, he stated that on 16 March 15 at around 2.30pm, he was on his way carrying his normal routines and on the way back to the supermarket, his motorcycle developed some engine trouble. He then stopped by the roadside to check on the engine. Shortly, thereafter another bike stopped by, and two unknown persons stopped by the side of his machine. The two unknown persons were subsequently identified as the respondents in this case.

[4] In his evidence, PW5 further stated one of the persons from the said motorbike approached him on the pretext of assisting him. He said the person then suddenly grabbed him and the person put his arm around his neck and demanded money from him.

[5] The person who had held him from the back was subsequently identified as the second respondent. Further, in his evidence, he stated that while the second respondent held him, the first respondent stood in front of him and demanded money. In his evidence, he stated he did have any money on him at that time. He offered them his hand phone. However, the first respondent refused to accept the hand phone and proceeded to punch him in the face. He stated he then immediately removed the helmet he was wearing and struck the second respondent head, who was restraining him at that time. The second respondent fell to the ground. Upon seeing the second respondent fell to the ground, the first respondent then went back to his bike and took an iron rod from the motorcycle. Upon seeing that the first respondent had an iron rod in his hand, PW5 distanced himself from the first respondent. At the same time, the second respondent got up from the ground. The second respondent went to PW5's bike and rode off with it. The first respondent also rode off immediately after that. PW5 was left by the roadside. He said he then called his friend to pick him up before proceeding to the police station to lodge a police report.

[6] In his police report made on the same day, PW5 did not describe the appearance of the robbers that had robbed him. In his evidence, however, he said a police officer by the name of Inspector Eric had enquired whether he could recognise the two robbers. He informed the inspector that he was not sure whether he could identify them. Around eight days after the report was lodged, he was asked by the police to attend an identification parade. At this identification parade, he identified two suspects who were later was identified as the first and second respondent in this case.

[7] Coming back to his evidence in the trial, he stated he managed to see the respondents' faces for around seven to eight seconds.

[8] In the trial, the prosecution had also adduced evidence through a witness PW4 to implicate the respondent with the charge. In his evidence, PW4 stated on the night of 16 March 2015; he was invited to the second respondent's house. In the second respondent's bedroom, he was shown some dismantled motorcycle components. The components were placed in the living room. PW4 testified that he knew the respondents since they moved into the neighbourhood.

[9] Another piece of evidence that the prosecution had relied on to show the involvement of the respondents to the present charge was the discovery of dismantled motorcycle components by a team of police officers near the respondents' house on 20 March 15.

The Appeal

[10] The gist of the appellant's appeal, in this case, revolves around the issue of the identification of the respondents by PW5 and also the circumstantial evidence adduced by PW4 and the discovery of the dismantled components of the motorcycle near the respondents' house. It was submitted if all these evidence were taken into consideration by the learned SCJ, she would have arrived at a different conclusion and not as what as was decided this case. In short, the issue of identification must not be treated in isolation without considering the circumstantial evidence of this case.

Finding

[11] The role of a court in hearing an appeal has been clearly established in numerous cases. In the case of *PP v. Jamal Sahmad & Anor* [2006] 8 CLJ 428, the learned High Court Judge Datuk David Wong (as he then was) stated as follows:

> In this appeal I also remind myself what was stated by Mohd Noor Ahmad JCA in the case of *Tan Thong Jin v. PP* [2002] 3 CLJ 552:
>
> > It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. But it is the duty of the appellate court to intervene in a case where the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Sivalingam v. Periasamy* [1996] 4 CLJ 545.) We make it clear here that the function of making primary findings of fact is confirmed exclusively to the trial court. We do not make findings of fact. We merely review the findings of primary fact made by the

trial court. In the exercise, we are alert to what was said by Mohamed Dzaiddin FCJ (as he then was) in *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 3 CLJ 163 to the effect that:

(1) It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (see p. 527E); *Crofter Hand Woven Harris Tweed Co Ltd & Ors v. Veitch & Anor* [1942] 1 All ER 142 and *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 followed.

(2) However, a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former (see pp. 5271 and 528A-B); *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326 and *Toy Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 LNS 202; [1964] MLJ 87 followed.

[12] In her judgment the learned SCJ, after considering the evidence of PW5 came to the conclusion that PW5's evidence on the identification of the respondents was doubtful. She said from the evidence; PW5 only managed to look at the respondents' faces for a short period of time ie, around seven or eight seconds. This evidence was not in dispute. PW5 in his own admission to the police shortly after the police report was lodged, had admitted to one Inspector Eric, he was not sure whether he could recognise their faces if he were to see them again. However, despite the said admission, at the identification parade PW5 was able to point out to the police that the two suspects from the identification parade were the respondents in this case. PW5 in his evidence stated at the ID parade when he saw the respondents' faces he suddenly remembered how the respondents looked like and was able to recognise them.

[13] Now, at this stage, something must be said of the identification parade that was carried out. The learned SCJ, learned counsel for the respondent and even the learned DPP, had conceded that the ID parade that was arranged by the police was unsatisfactory. Learned counsel for the respondents pointed out that based on the standard operating procedure of the police, in every ID parade there must be at least ten participants for each respondent to be line up in the ID for the witness to identify. The purpose is quite obvious, to make sure that the suspects were not easily singled out if the number of participants is too small. In the present ID parade, there were only

ten participants arranged for PW5 to identify. The ten participants included the respondents themselves. It was submitted that this had prejudiced the respondents, and the identification made by PW5 were, therefore, doubtful and was not proven beyond reasonable doubt. It was submitted that the principles in *Turnbull*'s case were not complied with. It would appear from the decision of the learned SCJ, this ground alone would be sufficient for her to hold that the charge was not proven as the main ingredients of the offence that the respondents were the ones who had committed the gang robbery were not established. The learned DPP took the opposite stand and argued that the identification issue should not be decided in isolation and must be taken into consideration with the other circumstantial evidence that had been adduced at the trial.

The Identification By PW5

[14] PW5, in his evidence, stated that he saw the faces of the robbers twice, for a period of around 7-8 seconds. As regards the first respondent, PW5 said he saw the first respondent's face when the first respondent punched him in the face. Similarly, when he was questioned whether he could see the second respondent's face, he gave the same answers that he saw the second respondent's face for around 7 or 8 seconds as well. In his evidence, he also admitted that the two persons who robbed him were helmeted. He also said they spotted long hair.

[15] From his evidence, it was clear that PW5 had managed to see the faces of the two persons for a short period of time. It was a submitted by counsel for the respondent; PW5 merely had a 'fleeting glance' of their faces.

[16] Whether the learned SCJ, based on the evidence of PW5 was right in arriving at her decision there was doubt in the identification of the respondent?

[17] Based on the evidence of PW5 as narrated earlier, the learned SCJ had described that PW5's evidence on the identification was done under difficult conditions.

[18] The above finding that PW5 merely had a short period of time to observe the faces of the robbers and the identification was made under difficult conditions, in my view was a finding of fact, and it is trite that the appeal court should be slow in interfering with such finding unless it can be shown that the finding was unsupported by the evidence in the trial.

[19] In order to satisfy herself as to whether the court can rely on such an identification, she has referred to the case of *Mohd Razaly Rahmad v. PP* [2015] 2 CLJ at p. 574, where the *Turnbull* guidelines were referred to.

> The *Turnbull* guidelines were reformulated into a three step test by the Singapore Court of Appeal in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR 465 and referred to recently by the Federal Court

in the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49 in a passage that bears useful reproduction:

> To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v. Turnbull* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33-35 of the judgment:
>
> > Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.
>
> If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

[20] First, she had identified that the prosecution's case hinged substantially on the correctness of PW5's evidence of the respondents and that the conditions when the identification was made were under difficult conditions.

[21] Secondly, in view of the above finding, she applied the principles in *Turnbull* ie, whether there was any evidence to support the correctness of the identification?

[22] That brings us to the issue of the identification of the respondent at the identity parade (ID parade). In her judgment, the learned SCJ had made a finding of fact that the ID parade was unsatisfactorily conducted. As I have mentioned earlier that even the appellant conceded that it was not conducted properly. The number of participants that were arranged for the ID parade was limited to ten persons; these included the respondent persons. With a small number of participants, the chances for PW5 to pick the suspects as the perpetrators were higher and this had prejudiced the respondents. In the case of *PP v. Jamal Sahmad & Anor* [2006] 8 CLJ 428, the learned High Court Judge Datuk David Wong (as he then was) had the occasion to deal with the procedures relating to ID parade. He states as follows:

> I shall first deal with the identification parade. It can be said that identification parade is only conducted when the alleged assailants are not known to the victim previously. The learned magistrate in her judgment found that the identification parade doubtful hence placed no reliance on it. Her main reason was that PW8 the officer who organised the identification parade could not confirm that PW2 had identified the accuseds. Not only do I find strange that PW8 could not confirm what happened at the identification parade, there was no report of the identification parade tendered in court. This report was alluded to by PW6, the investigation officer of the case. Without that report, neither this court nor the court below can find any use of the identification of the accuseds by the victim. I say that because there is no evidence to show how the identification parade was conducted. The law on the procedure of how an identification parade should be conducted is summarised in *Mallal's Criminal Procedure* 4th edition at page 155 which, among others, provide the following guidelines:
>
> 1. An accused should be placed among a specific number of people. The ratio should be no less than 10 people to one accused.
> 2. The people used for the identification parade should be from the same races.
> 3. When there are two or more accused, there should be separate identification parade for each accused.
>
> As stated earlier there is no evidence in court that the above procedures were adhered to. That being the case I agree with the learned magistrate's conclusion on identification parade.

[23] In the present case, and based on the principles in the above case, I find the identification parade that was carried out did not meet the requirements explained in *Jamal Sahmad*'s case (*supra*) and had prejudiced the respondents, therefore the finding by the learned SCJ not to rely on the identification made from the ID parade was justified, and there was no misdirection either on the facts or the law, to warrant this court to intervene in the said finding.

Whether The Appellant Can Rely On The Circumstantial Evidence To Support That There Was No Mistake In The Evidence Relating To The Identification In This Case?

[24] In the present case, to recapitulate, the prosecution had relied not only on the evidence of PW5 to bring home the charge against the respondents but also the fact that the dismantled parts of the motorcycle stolen from PW5 were found in the bushes behind the respondents' house. The learned SCJ on this issue points out the evidence was insufficient to link the respondents to the charge.

[25] I will firstly deal with the evidence of PW4. In her judgment the learned SCJ after evaluating the evidence of PW4 said as follows at p. 101 of the record of appeal:

> PW4 only said that he saw components of a black EX 5 motorcycle in the 2nd respondent room. Nothing specific was mentioned about the components. Even when shown the photographs of the said components (exhibit P2 (6), PW 4 only agreed to the extent that the components 'look similar' to the ones he had seen in the 2nd respondent bedroom. He never made any positive assertion that those components in the 2nd respondent's bedroom were the same components belonging to the stolen motorcycle.

[26] In respect of the above finding, I do not find the learned SCJ can be faulted for holding that PW4's evidence was inconclusive, as the evidence given by PW4 was short of proving that the said components he saw in the second respondent's bedroom were the same components that were discovered by PW2's team on the 20 March 2015. Without the crucial confirmation by PW4 on this piece of evidence, there was no link to show that the components he saw were the same components that were discovered subsequently, and in turn to connect the evidence to the identification of the respondents by PW5.

[27] The second point argued by the appellant relates to the discovery of the dismantled motorcycle components that were discovered in the bushes behind the respondent persons' house. The learned SCJ had addressed this issue in her judgment on p. 104 of the ROA. In the case at the lower court, the learned DPP submitted the discovery of the components shortly after the robbery, presumes that the second respondent was at least, to be the robber pursuant to s. 114(a) of the Evidence Act 1950.

[28] The section reads as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

[29] In respect of this issue, again the learned SCJ had considered the circumstances which the components were found and ruled that there was no evidence to support or to link the second respondent at least to the said discovery. The discovery was in an open space and there was no evidence that the second respondent had informed the police or led the police to the discovery of the components. Without, such evidence the mere fact that the components were found within the surrounding areas where the respondent house was located would not be sufficient for the court to hold the respondents in possession of the components and within the meaning of s. 114(a).

[30] In this appeal, learned counsel for the appellant has also referred this court to the case of *Jaferi Ipee v. PP* [2013] 3 CLJ at p. 381, where the court had discussed the *Turnbull*'s guidelines and states as follows:

> The guidelines basically state the factual circumstances that would justify an 'acceptable' identification. It speaks of visibility and opportunity.

[31] Learned counsel for the appellant submits that in the present appeal, the victim had all the opportunity to see the faces of both the respondents and there was no issue of visibility since there was nothing to obstruct the victim from seeing the face of both respondents.

[32] With respect, I think the facts in *Jaferi*'s case (*supra*) were distinguishable from the facts in the present case. In the present case, the witness PW5 had the two robbers under observation for a short period of seven to eight seconds. They were also wearing helmets at the material time. It is common knowledge that one would find it hard to recognise a person's face when a person is helmeted. This fact, coupled with the short span of time where PW5 had the opportunity to observe the robbers' faces would obviously make it difficult for one to be certain of how the person would look like without the helmet.

[33] In *Jaferi*'s case (*supra*), the court held that the identification of the accused by the deceased's wife was not obstructed, and it was not a fleeting glance. The court held at page of the judgment as follows:

> From the above listed salient facts, this is not a case of a "fleeting glance" within a very short span of time. PW6 had all the opportunity and with good visibility for her evidence on the identification of the appellant to be acceptable. The circumstances, in this case, is a far cry from the poor visibility and opportunity as in the case of *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350; [1985] 2 MLJ 335.

Conclusion

[34] Based on all the above reasons, I do not find that the learned SCJ had fallen into any errors in arriving at her finding of facts or law in this case and therefore there were no reasons for this court to intervene in the said finding and order. In the circumstances, I dismissed the appeal and affirmed the decision and order of the learned SCJ.